Supreme Court, U.S.
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No. 09- 09-432

IN THE

Supreme Court of the United States

GLOBAL NETWORK COMMUNICATIONS, INC.,

Plaintiff-Petitioner,

- against -

CITY OF NEW YORK and CITY OF NEW YORK DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner operated public pay telephones on the public rights-of-way of the City of New York. It applied for a franchise to continue to operate those phones after the City of New York promulgated a scheme to regulate such phones. The franchise application was denied.

1. Under section 253 of the Federal Communications Act, 47 U.S.C. § 253, may a locality consider the background of the president of an operator of public payphones in deciding whether to grant a franchise to the corporate operator of a telecommunications service on its public rights-of-way?

2. If the answer to question 1 is "yes," under section 253 of the Federal Communications Act, must a locality consider alternatives short of an outright prohibition insofar as the locality's legitimate interests are affected?

CORPORATE DISCLOSURE STATEMENT

Pursuant to rule 29.6 of this Court, Petitioner Global Network Communications, Inc. states that it is a privately-held corporation and no publicly-held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Global Network Communications, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion disposing of the appeal by the Second Circuit, which is published at 562 F.3d 145 (2d Cir. 2009), is reproduced at App. A. The Second Circuit's unpublished order denying a petition for a panel rehearing and rehearing *en banc* is reproduced at App. C.

The district court's opinion granting summary judgment to Defendants is published at 507 F. Supp. 2d 365 (S.D.N.Y. 2007) and is reproduced at App. B.

JURISDICTION

The Second Circuit issued its opinion on April 8, 2009, and its opinion and judgment were entered on April 8, 2009. (*See* App. A.) It denied Petitioner's motion for the panel's rehearing the case or for a rehearing *en banc* by order entered on July 10, 2009. (App. C.)

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 253 of the Federal Communications Act, 47 U.S.C. § 253, entitled "Removal of barriers to entry," provides in relevant part as follows:

> (a) In general
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and local government authority
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public

> rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) Preemption
>
> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253.

INTRODUCTION

Petitioner Global Network Communications, Inc. ("Global") seeks review of the Second Circuit's decision allowing Defendants the City of New York and Department of Information Technology and Telecommunications of the City of New York (together "the City") to deny a franchise for the installation and operation of public pay telephones ("PPTs") on the public rights-of-way in the City of New York to Petitioner. In doing so, the Second Circuit, and the district court (the Southern District of New York) before it, afforded to the City extraordinary powers in regulating the provision of telecommunications services in contradiction to the Telecommunications Act of 1996 (the "Telecom Act").

While the decisions below warrant this Court's consideration of the scope of the Telecommunications Act, *certiorari* is sought because the Second Circuit's decision puts it in conflict on an important issue with earlier decisions from the Ninth Circuit. Sup. Ct. Rule 10(a).

STATEMENT OF THE CASE

1. This action was commenced in 2003 by Petitioner Global Network Communications, Inc. against the City. Global, an operator of PPTs on the City's public rights-of-way, had been advised that its application for the award of a franchise to continue to operate those phones would be denied, and while the action was pending it was, in fact, denied. Global's amended complaint alleged insofar as relevant to this Petition that the franchise-denial violated section 253 of the Telecommunications Act, 47 U.S.C. § 253.

The jurisdiction of the district court (S.D.N.Y.) existed pursuant to that court's jurisdiction of actions that raise federal questions. This action was brought pursuant to, *inter alia*, the Federal Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (of which the Telecom Act is a part), and asserted claims under the United States Constitution. The district court had original jurisdiction over this case because it raised federal questions. Petitioner also invoked the district court's supplemental jurisdiction with respect to the state-law claims it asserted.

The Second Circuit had jurisdiction over Petitioner's appeal because the district court had granted

Respondents' motion for summary judgment and had entered a final judgment against Petitioner.

I. Background

1. For over two decades, Global operated public pay telephones ("PPTs"), chiefly on the public rights-of-way in the City of New York. In 1995, the City enacted regulations applicable to all PPTs that were located on those public rights-of-way. These regulations sought to bring order to a market that had been dominated by the incumbent local exchange carrier (now known as Verizon). Among the requirements of the new regulations was that PPT-operators obtain a franchise from the City and operate under the terms of a franchise agreement. Defendant Department of Information Technology and Telecommunications ("DoITT" (pronounced "do-it")) is the City agency responsible for regulating operators of PPTs on the public rights-of-way in the City of New York.

Shortly after the City promulgated its regulatory scheme, Congress enacted the Telecommunications Act of 1996 as an effort to bring competition to the entire range of telecommunications service in the United States. That Act, which amended the Federal Communications Act, included a provision to address the interplay between telecom service providers and municipalities, i.e., section 253.

In compliance with the City's regulations, Global applied for a franchise and registered its PPTs on the required registry. The City denied Global a franchise, however, because Ronald Massie, president of Global,

pled guilty (in a plea agreement) to three crimes, although he also cooperated with the federal government by testifying in criminal trials against alleged organized crime figures. No proceedings were brought against Global itself.

The question presented here is whether the background of the president of a telecommunications-service provider was appropriately considered at all by the City under the Telecom Act.

2. Based upon Mr. Massie's guilty plea and purportedly because of concerns about Global's readiness and willingness to pay franchise fees to the City for its PPTs, the City indicated that it would deny a franchise to Global for the operation of PPTs on the City's public rights-of-way. On March 11, 2005, the City formally denied a franchise to Global:

> [T]here are multiple independent bases for not proposing the award of a franchise to Global to the Franchise and Concession Review Committee: (1) Global established a significant part of its business through its use of organized crime soldiers; (2) Global has defrauded property owners who authorized use of property for Global PPTs; and (3) Global has been repeatedly delinquent in the payment of registry fees and thus cannot be reliably trusted to timely pay franchise compensation and also has significant unpaid fines related to payphone operations that remain payable to the City.

Quoted at 562 F.3d at 149, App. A, *infra*, at 5a.

II. The Decisions Below

1. The Southern District of New York's Decision

The district court granted the City's motion for summary judgment on the ground that the City's concerns about Global's supposed ability and willingness to pay fees, based on a guilty plea of Global's president, fell within the "safe-harbor" of section 253(c) of the Telecommunication Act, 47 U.S.C. § 253(c), *quoted supra*, at 2. *See* 507 F. Supp. 2d 365, App. B.

2. The Second Circuit's Decision

In affirming the City's denial of a franchise to Global, the Second Circuit said:

> The City's actions in this case fall within th[e] "safe harbor" exception [of section 253(c)]. The statutory grant of authority to "manage the public rights-of-way" encompasses the right to reject an applicant on the basis of its affiliation with organized crime, especially upon a demonstrated record of operating the facilities fraudulently, or otherwise in violation of law, with reliance on organized crime to further its business interests. We conclude that the City's refusal to grant Global a franchise to operate on public rights-of-way on the basis of this past history is fully within the scope of the authority provided by Section 253(c).

> Furthermore, the authority under § 253(c) to collect fair and reasonable compensation from telecommunications service providers operating on City property implies authority to deny a permit to entities which have demonstrated lack of financial responsibility and have practiced fraud to evade their financial obligations. Global has an undisputed past history of defrauding other parties with whom it contracted to operate PPTs on their property and being delinquent on paying fees owed to the City. The City undoubtedly had a legitimate concern about its ability to collect the compensation to which it is entitled. We conclude that the City's refusal to grant Global a franchise on the basis of this concern is authorized by the "safe harbor" exception of Section 253(c).

562 F.3d at 151, App. A, *infra,* at 10a.

The City considered no resolution with regard to Global except for Global's being prohibited from providing the telecommunications service, and neither the district court nor the Second Circuit considered an alternative when they endorsed the City's action.

REASONS FOR GRANTING THE PETITION

The decision in this case presents a plain conflict with decisions in the Ninth Circuit concerning the leeway granted by the Telecom Act to municipalities in deciding whether to grant franchises to applicants that wish to use public rights-of-way.

1. Conflicting Opinions from the Ninth Circuit

This Petition should be granted because the manner in which the Second Circuit dealt with the important issues before it, and its permitting the City to deny a franchise to Global, runs afoul of the pro-competitive standards of the Telecom Act as reflected in decisions from the Ninth Circuit. Sup. Ct. Rule 10(a).

(a) City of Auburn v. Qwest Corp.

In *City of Auburn v. Qwest Corp.*, the Ninth Circuit addressed franchise requirements of a number of localities in the State of Washington. 260 F.3d 1160 (9th Cir. 2001), *overruled in part by Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (*en banc*). It wrote,

> Section 253(a) bars all state and local regulations that "prohibit or have the effect of prohibiting" any company's ability to provide telecommunications services unless the regulations fall within the statute's "safe harbor" provisions (of which only § 253(c), related to local regulation of rights-of-way, is relevant here). The preemption is virtually absolute and its purpose is clear – certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. "Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications." *AT & T Communications v. City of*

> *Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998).

Id. at 1175. Reviewing the extant lower-court cases, the court concluded that they "persuasively indicate that a regulatory structure that allows a city to bar a telecommunications provider from operating in the city 'prohibit[s] or ha[s] the effect of prohibiting' the company's ability to provide telecommunications services under 47 U.S.C. § 253(a)." *Id.*, at 1176.[1]

Auburn then looked to section 253(c) of the Act to determine whether the localities in that case were protected by the "safe harbor." Section 253(c) provides,

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c).

The Ninth Circuit recognized, as Congress instructed it, that localities have a place in regulating

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[1] As discussed below, *infra* at 14, an *en banc* panel of the Ninth Circuit overruled *Auburn*'s interpretation of section 253(a) of the Act.

telecom providers that sought access to their public rights-of-way. But unlike the Second Circuit in this case, the Ninth Circuit limited that place to one that directly affected the management of those rights-of-way. 260 F.3d at 1179-80.

Auburn approvingly referred to the Federal Communications Commission, which the court said "explained [that] right-of-way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way" and quoted from the FCC's decision in *In re TCI Cablevision of Oakland County, Inc.* that, "'Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.'" *Auburn*, 260 F.3d at 1178 (quoting *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396 (F.C.C. 1997), ¶ 103).

Under section 253(c), then, local regulations that require an applicant "to undergo an extensive application process that is not directly related to management of the public rights-of-way," that "impose reporting requirements or other controls over matters not directly related to management of the rights-of-way," "require, either through the application process or by other means, that franchise agreements contain certain conditions unrelated to management of the rights-of-way," or that "grant . . . unfettered discretion to insist on unspecified franchise terms and to grant, deny, or

revoke a franchise based on unnamed factors" are outside section 253(c)'s safe harbor. *Auburn*, 260 F.3d at 1178-79. This is a non-exclusive list. *Id.* at 1179.

(b) Qwest v. Berkeley

The Ninth Circuit considered section 253 again in 2006 after Qwest Communications challenged the City of Berkeley's regulations governing access to that city's public rights-of-ways for, *inter alia*, sidewalk excavation. *Qwest Communications, Inc. v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006).[2] It found Berkeley's regulations were not within section 253(c)'s safe harbor "because they go to an applicant's technical and legal qualifications rather than the actual management of the public right-of-way itself." *Id.* at 1259. Among other things wrong with the scheme, "the applicant is subject to having its books and records audited to ensure the veracity of the applicant's submissions regarding an applicant's technical and legal qualifications under federal and state law, with the potential for criminal and civil penalties in the event that something is inaccurate." *Id.*

"These requirements do facilitate the City's control over the public rights-of-way," *Qwest v. Berkeley* said,

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[2] *Qwest v. Berkeley* relied on *Auburn* with respect to whether a probability of preclusion by a regulation sufficed to establish a violation of section 253(a). 433 F.3d at 1256-57 (also relying on *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004)). Under *Sprint II*, that holding is no longer good law. (*See, infra*, at 14.) For its part, *Qwest v. Portland* did not address the substance of section 253(c). *See* 385 F.3d at 1242-43.

"but are attempts to regulate and control the companies by requiring certification and documentation of their legal and technical status" and are thus "not protected by § 253(c) and are, therefore, preempted." *Id.*

(c) Sprint Telephony v. San Diego

More recently, the Ninth Circuit decided *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (*en banc*) ("*Sprint II*"). There, the *en banc* panel overruled *Auburn* insofar as that earlier decision found it sufficient that a challenged regulation *might* have the effect of prohibiting competition. "We therefore overrule *Auburn* and join the Eighth Circuit in holding that 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.' *Level 3 Commc'ns* [*v. City of St. Louis*], 477 F.3d [528] at 532 [(8th Cir. 2007)]." 543 F.3d at 578.

Under section 253's scheme, the first issue is whether a locality has taken steps that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(c). If so, such steps are permitted if they fall within the safe harbor of section 253(c). *Auburn*, *Sprint II* held, incorrectly interpreted section 253(a) by allowing the "mere possibility of prohibition" to suffice to trigger the section 253(c) analysis. Left undisturbed, however, was *Auburn*'s analysis of the scope of that safe harbor.

Here, of course, the prohibition has absolutely pro-

hibited Global from providing a telecommunications service on the City's public rights-of-way. Thus, the issue is whether the prohibition was covered by the safe harbor.

2. The Decisions Of The Ninth Circuit That Are In Conflict With That Of The Second Accurately Reflect The Limits On A Locality's Ability To Regulate The Provision Of A Telecommunications Service On The Public Rights-Of-Way.

The purpose of the Telecom Act is to increase and enhance competition. In this case, the City's rationale for denying a franchise to Global is outside what is permitted by section 253(c). As the Ninth Circuit held in *Qwest v. Berkeley*, regulations that relate "to an applicant's technical and legal qualifications rather than the actual management of the public rights-of-way itself" enjoy no "safe harbor." 433 F.3d at 1259. "Regulations requiring 'the applicant [to] submit proof of its financial, technical, and legal qualifications do not regulate the public rights-of-way' [and] are impermissible." *Id.* at 1258 (quoting *City of Auburn v. Qwest Corp.*, 260 F.3d at 1178 (internal citations and quotation marks omitted in *Qwest v. Berkeley*)).

Berkeley makes clear that the preemptive language in section 253(a) is virtually absolute and that management of rights-of-way means what it says, i.e., control over the rights-of-way and not control over companies that operate there. Municipal provisions dealing with the financial, technical, and legal qualifications of applicants are not rescued because they do not regulate rights-of-way. The Ninth Circuit specifically rejected

the argument that because they were "properly related to the City's legitimate interest in public rights-of-way management" the regulations would be saved by section 253(c). Notwithstanding that the regulations "facilitated the City's control over the public rights-of-way," the court found them preempted because they dealt with the applicant companies and not the rights-of-way.

"It is not enough to argue," *Auburn* had earlier concluded, "that the ordinances regulate *aspects* of telecommunications companies that are *related to their fitness to provide services,* and therefore use the rights-of-way." 260 F.3d at 1179 (emph. in orig.).

Yet the regulations endorsed by the Second Circuit here are precisely the types of applicant-characteristics rejected in *Auburn* as being outside the purview of a locality under the pro-competition policy reflected generally in the Telecom Act, and specifically in section 253. They are "ordinances [that] regulate *aspects* of telecommunications companies that are *related to their fitness to provide services,* and therefore use the rights-of-way," *Auburn*, 260 F.3d at 1179 (emph. in orig.), but actually "regulate" Global as a "telecommunications company[y], not merely the rights-of-way," *id.*, at 1178.

The Ninth Circuit's approach would invalidate the City's decision to withhold a franchise from Global on the City's stated concerns with Global's qualifications.

(a) The Scope Of The City's Determination Well Exceeded What Is Permitted By The Act.

The Ninth Circuit recognized too, as the Second did not, that Congress requires that restraints on competition governing the telecommunications industry be kept to a bare minimum. In the case of localities, this meant that only restrictions that directly related to the management of their public rights-of-way would be tolerated. Allowing more improperly, under the Congressional scheme, interjects localities into the role of king-makers, with the power to decide which firms will be permitted to offer telecommunication services. And which will not.

Moreover, to the extent that a locality may consider the appropriateness of a particular applicant for a franchise, its discretion must be limited to deciding what is necessary to protect its, the locality's, legitimate interests. Accordingly, the wholesale prohibition imposed by the Second Circuit as to Global cannot stand because the City's *legitimate* interests can be protected otherwise, by, for example, requiring a bond to ensure the future payment of properly-assessed fees.

Prohibition, of course, is the "most restrictive" means of protecting an interest. It is clear, though, that before taking such a step a locality must consider less restrictive alternatives.

It may prove difficult to articulate a particular line beyond which a locality may not go under Congress' pro-competition mandate. Beyond question, however, a locality must at least endeavor to accommodate that

mandate when doubts arise. In the payphone context, the FCC found that the Connecticut public utility commission violated section 253 when it chose "the most restrictive means available in its efforts to protect payphone customers – a flat prohibition," and indicated that the PUC would be required to demonstrate "that other methods short of a flat prohibition are insufficient to protect payphone customers." *New England Public Communications,* 11 FCCR 19713, 1996 FCC LEXIS 6842 (FCC 1996).

Under this FCC approach to payphone regulation, articulated in *New England Public Comm.,* the City violated section 253 because it did not demonstrate, or even attempt to demonstrate, that there were no alternatives to its total ban on Global's provision of PPT service to protect the City's legitimate and federally-permitted interest in obtaining compensation from its franchisees.

Ultimately, whether Global has a record of "trustworthiness" to pay franchise fees is superseded by the City's own requirements for security for those payments by franchisees. The City's ability to collect compensation from franchisees – which Global sought to become – is protected by a security fund or bond required of all franchisees. In other words, if the City had a legitimate interest in collecting fees and the fees were properly calculated *and* the City had a legitimate concern about whether an applicant would pay the fee, it could have simply required payment in advance.

In sum, if these are issues that are legitimately the concern of the City, the City handled them badly. But

under the Ninth Circuit's interpretation, they should not have been handled at all.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 6, 2009

APPENDIX

APPENDIX A

APPENDIX A: DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 8, 2009

Docket No. 07-5184-cv
Reported at 562 F.3d 145

GLOBAL NETWORK COMMUNICATIONS, INC.,

Plaintiff-Appellant,

v.

CITY OF NEW YORK and CITY OF NEW YORK DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS,

Defendants-Appellees.

October 16, 2008, Argued
April 8, 2009, Decided

JUDGES: Before: McLAUGHLIN, LEVAL, and POOLER, Circuit Judges.

APPENDIX A

[562 F.3d at 147] OPINION

LEVAL, Circuit Judge:

Plaintiff, Global Network Communications, Inc. ("Global") appeals from an order of the United States District Court for the Southern District of New York (Stanton, *J.*) granting summary judgment in favor of defendants, the City of New York ("City") and its Department of Information Technology and Telecommunications ("DoITT"). Global's lawsuit results from the City's denial of Global's application for a public pay telephone ("PPT") franchise on the basis of its ties to organized crime, its past history of fraud, and its debts and arrears. The district court held that the City's denial of Global's application, as well as the City's regulatory scheme for PPTs, did not violate the federal Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 253. The district court further held that the City's regulatory scheme for PPTs was not preempted by state or federal law. Finally, the court dismissed Global's claims that the City's actions violated its constitutional rights.

We agree with the district court's conclusion that the City's actions fall squarely within the safe harbor provisions of Section 253(c) of the TCA, which provide local government with the authority to manage public rights-of-way and to require fair and reasonable compensation from telecommunications providers. Global furthermore has failed to identify any federal or state law that preempts the City's actions, and its constitutional claims are without merit. Therefore, we affirm the summary judgment of the district court.

APPENDIX A

BACKGROUND

Since 1959, New York City has required a license as a precondition to the installation or operation of a PPT on city-owned and city-managed property, including sidewalks. Prior to 1995, the City did not enforce this requirement rigorously. Several telecommunications providers, including Global, installed PPTs on City sidewalks and on the sides of buildings intruding onto public rights-of-way without having obtained the required license. In 1995, however, the City passed Local Law 68, which established the regulatory scheme in effect today. That law provides that "[n]o public pay telephone shall be installed . . . [on] any street or other inalienable property of the city without a permit." N.Y. City Admin. Code § 23-402. Permits are issued only to telecommunications providers who have been granted a franchise to operate PPTs by the City's DoITT. *Id.* § 23-403(a)(1). Local Law 68 also offered a conditional amnesty procedure whereby previously installed unlicensed PPTs could remain in operation if the owner obtained a franchise, identified its pre-existing PPTs on a registry submitted to the DoITT, and paid the City interim fees equal to $75 per PPT per year, and the Commissioner lodged no objection to the continued operation of such phones on City-owned property. N.Y. City Local Law 68, § 6(a), (d) (1995). Any company whose application for a franchise was denied by the Commissioner's decision not to approve a franchise for such owner, was obliged within 30 days either to remove its unlicensed PPTs or sell them to a company that possessed a franchise. *Id.* § 6(c). Local Law 68 applies only to City property; PPTs on private property are not subject to the City's regulatory scheme. *See*

APPENDIX A

N.Y. City Admin. Code § 23-402.

On May 30, 2000, the DoITT rejected [562 F.3d at 149] Global's initial request for a franchise on the ground that its CEO and sole shareholder, Ronald Massie, is an associate of the Bonnano organized crime family accused of loan sharking and money laundering through the company. Massie subsequently pleaded guilty to a federal indictment charging him with loan sharking, mail fraud, and bank fraud. He later testified that Global derived 20 to 30 percent of its business from locations that were chosen or secured by members of the Bonnano crime family. He admitted to using connections to the Bonnano crime family in order to secure PPT locations, and property owners reported that these individuals threatened and intimidated them into accepting the PPTs. Massie also admitted that Global had defrauded the owners of the properties on which Global had installed its PPTs out of $ 1.8 million in commissions.

Global challenged the franchise denial through a special proceeding pursuant to Article 78 of the New York Civil Practice Laws and Rules. On July 1, 2002, the New York Supreme Court (Gans, *J.*) vacated and remanded the matter to the DoITT for further proceedings because the denial implicated Global's liberty and property interests and Global therefore should be afforded "an opportunity to respond to the allegations regarding [Massie's] conviction and its relationship to the operation of the business." *Global Network Commc'ns, Inc. v. Dobrin*, No. 120402/00, slip op. at 9 (N.Y. Sup. Ct. July 1, 2002).

After conducting further proceedings in which Global was afforded the opportunity to respond, the DoITT again rejected Global's franchise request. In its March 11, 2005 determination, the DoITT explained:

> [T]here are multiple independent bases for not proposing the award of a franchise to Global . . . : (1) Global established a significant part of its business through its use of organized crime soldiers; (2) Global has defrauded property owners who authorized use of property for Global PPTs; and (3) Global has been repeatedly delinquent in the payment of registry fees and thus cannot be reliably trusted to timely pay franchise compensation and also has significant unpaid fines related to its payphone operations that remain payable to the City.

The DoITT also specifically noted that "even if Massie did divest himself more fully from Global [than merely withdrawing from day-to-day operations], the nature of the City's justifiable concerns about Global would not be adequately resolved" because of "the intimate involvement of Global itself with organized crime" and "the fact that Global has failed to timely pay fines owed to the City and has repeatedly been late in its registry payments."

Global again challenged the Commissioner's determination through an Article 78 proceeding. In a decision dated November 28, 2005, the New York Supreme Court (Feinman, *J.*), denied Global's petition on the merits. The court held that the DoITT had lawfully exercised its discretion in its March 11, 2005

decision and Global's due process rights had not been violated. *Global Commc'ns, Inc. v. Menchini*, No. 109531/05 (N.Y. Sup. Ct., Nov. 28, 2005). Global failed to perfect an appeal.

Global filed its complaint in this lawsuit on October 7, 2003, and amended its complaint on July 1, 2004, setting forth eleven causes of action. The first five claims allege that the City's PPT regulatory scheme and its denial of a PPT franchise to Global violate the TCA, 47 U.S.C. § 253. The sixth and seventh claims allege that the City's legal framework is preempted by both existing state law and federal law.[1] The remaining claims allege violations of Global's constitutional rights and seek damages, costs, and attorney fees,

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[1] Global contends that state law preemption applies because the City's regulatory scheme violates New York State Public Service Law § 90(3)(1). Section 90(3)(1) prohibits certain forms of regulations of PPT service providers (e.g., supervision and investigation into the general condition of franchisees; pre-approval of any assignment, transfer, lease, contract or agreement affecting PPT franchises). Global argues that the City's scheme attempts to impose such regulations, notwithstanding Section 90(3)(1)'s express prohibition.

Global also argues that federal preemption applies because of 47 U.S.C. § 276 which states that FCC regulations trump any inconsistent local requirements regarding payphone services. It contends that the City's regulatory scheme is inconsistent with 47 C.F.R. § 64.1330(a), an FCC regulation mandating that states review and remove regulations that impose market entry or exit requirements. Global asserts that the City's franchise and permit schemes impair both entry and exit from the City's PPT market.

pursuant to 42 U.S.C. §§ 1983 and 1988.[2]

The district court, in a decision dated June 9, 2005, granted the defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which [562 F.3d at 150] relief can be granted. *Global Network Commc'ns, Inc. v. City of New York*, 373 F. Supp. 2d 378 (S.D.N.Y. 2005). The court ruled that the City's denial of Global's application for a franchise fell within the safe harbor exception of Section 253(c) of the TCA, which provides the City with the authority to manage the public rights-of-way and require fair and reasonable compensation. It also dismissed all of Global's claims relying on preemption by state and federal law, as well as Global's claims of constitutional violations.

On appeal, this court vacated the judgment and remanded on the ground that the district court erred in "consider[ing] matters outside plaintiff's complaint" in granting a motion under Rule 12(b)(6).[3] *Global*

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[2] Global asserts three allegations of constitutional violations: (1) the City, by refusing to grant Global a franchise and by ordering it to sell or remove its PPTs, deprived Global of its property without reasonable compensation and due process of law in violation of the Fourteenth Amendment; (2) the City has substantially impaired Global's rights under its contracts with third parties in violation of the Contracts Clause; and (3) the City has violated Global's right of free speech as guaranteed by the First Amendment by refusing to allow Global to place advertising on curb-line PPTs.

[3] The inappropriately considered matters included Massie's testimony in an unrelated criminal proceeding and the DoITT's determination of March 2005 that Global could not be expected to

Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 156 (2d Cir. 2006). We ruled that the district court should have converted the defendants' Rule 12(b)(6) motion into a Rule 56 motion for summary judgment and given the plaintiff an opportunity to contest the matter upon which the defendant's motion relied. *Id.* at 158. We also stated that "in remanding on procedural grounds, we express no opinion regarding the correctness of the trial court's rulings on the merits, and it may well be that upon a motion for summary judgment the court will reach the same conclusion as it did initially." *Id.* at 156.

On remand, the defendants moved for summary judgment, and the district court granted the motion. *Global Network Commc'ns, Inc. v. City of New York*, 507 F. Supp. 2d 365 (S.D.N.Y. 2007) [App. B., *infra*]. The district court ruled that the City's denial of Global's PPT franchise "fits comfortably within [the] safe-harbor exception" of Section 253(c) of the TCA. It reasoned that inherent within the City's right to require compensation is "the reasonable expectation that its compensation will be paid accurately in full, on time, and without criminal involvement or fraud" and found that the evidence supported DoITT's determination that it could not "trust Global to pay the City's compensation in [a timely or honest] manner." *Id.* at 372. The court rejected Global's argument that the City's actions were discriminatory and therefore not protected by the safe-harbor exception. It also rejected Global's claims that the City's regulations are

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pay its obligations to the City in a timely or honest manner.

preempted by state and federal law. Finally, the district court denied all of Global's federal constitutional claims. This appeal is taken from that ruling.

DISCUSSION

We review an award of summary judgment *de novo*, and will uphold the judgment if the evidence, viewed in the light most favorable to the party against whom it is entered, demonstrates that there are no genuine issues of material fact and that the judgment is warranted as a matter of law. *Rubens v. Mason*, 527 F.3d 252, 254 (2d Cir. 2008). We find that the district court correctly granted summary judgment in favor of the defendants on all eleven causes of action.

I. Section 253 of the Telecommunications Act

Global's major argument on appeal asserts that the City's franchise denial violated *Section 253* of the TCA. Section 253(a) provides that "[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or [562 F.3d at 151] intrastate telecommunications service." 47 U.S.C. § 253(a). When regulating telecommunications service providers, a state or local authority must bear in mind that "[a] major purpose of the [TCA] was to end local telephone monopolies and develop a national telecommunications policy that strongly favored local telephone market competition." *Global Naps, Inc. v. Verizon New England*, Inc., 454 F.3d 91, 94 (2d Cir. 2006).

The TCA does not altogether deny states and localities the ability to regulate telecommunication services.

On the contrary, *Section 253* provides for a number of "safe harbor" exceptions for states and local governments to establish regulatory requirements. Among the "safe [9] harbor" exceptions is a provision authorizing state and local governments to regulate telecommunication services on public property and to collect compensation for its use, if certain parameters are observed. Section 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c).

The City's actions in this case fall within this "safe harbor" exception. The statutory grant of authority to "manage the public rights-of-way" encompasses the right to reject an applicant on the basis of its affiliation with organized crime, especially upon a demonstrated record of operating the facilities fraudulently, or otherwise in violation of law, with reliance on organized crime to further its business interests. We conclude that the City's refusal to grant Global a franchise to operate on public rights-of-way on the basis of this past history is fully within the scope of the authority provided by Section 253(c).

Furthermore, the authority under § 253(c) to collect fair and reasonable compensation from telecommunications service providers operating on City property implies authority to deny a permit to entities which have demonstrated lack of financial responsibility and have practiced fraud to evade their financial obligations. Global has an undisputed past history of defrauding other parties with whom it contracted to operate PPTs on their property and being delinquent on paying fees owed to the City. The City undoubtedly had a legitimate concern about its ability to collect the compensation to which it is entitled. We conclude that the City's refusal to grant Global a franchise on the basis of this concern is authorized by the "safe harbor" exception of Section 253(c).

Global argues that the City cannot claim the benefit of the "safe harbor" exception because it has not awarded PPT franchises in a "competitively neutral and nondiscriminatory" manner as required by Section 253(c). To support this contention, Global points to instances in which the City has granted franchises to other entities which had engaged in illegal activity, alleging that in light of these other franchise grants, the denial of Global's application constitutes discriminatory treatment, which disqualifies the City from the Section 253(c) "safe harbor" exception. However, as the district court noted, none of these instances Global cites raised concerns of comparable gravity. *Global*, 507 F. Supp. 2d at 373. Because Global's criminal history is of a different and more serious order than those of the other companies that were granted PPT franchises, the district court was justified in concluding that the City's denial of Global's franchise [562 F.3d at 152] was

within the scope of § 253(c)'s safe harbor.

Global contends that our decision in *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), "compels the conclusion that the City's laws, regulations, and requirements regulating the provision of telecommunications service via PPTs violate" the TCA. We disagree. Our reasons in *TCG* for invalidating aspects of the White Plains ordinance have no bearing on the present case.

In *TCG*, we found that conditions imposed by White Plains in granting a franchise had "the effect of prohibiting the ability of an[] entity to provide . . . telecommunications service," and thus would violate § 253(a), unless they fell within the "safe harbor" exception provided by § 253(c). *Id.* at 76-77. As to various provisions of the White Plains ordinance, we ruled that they did not come within the boundaries allowed by the safe harbor. While the safe harbor provision allows a locality to charge "fair and reasonable compensation . . . for use of public rights-of-way," the compensation charged must be on a "competitively neutral and nondiscriminatory basis." 47 U.S.C. § 253(c). Because White Plains charged TCG a percentage of its gross revenues, but did not impose the same charge on another franchisee, we found that the charge failed to satisfy the requirement of nondiscrimination. *TCG*, 305 F.3d at 79. Other aspects of White Plains's regulatory scheme were also not protected by the safe harbor because they sought to regulate matters beyond the proper scope of its authorized regulatory power. Section 253(c) essentially protects the ability of a locality "to manage the public rights-of-way." Certain provisions of the White Plains

scheme were designed not to regulate use of the public right-of-way but rather to regulate telecommunications. We ruled, for example, that White Plains exceeded the boundaries of its safe harbor when it required prior approval of placement of telephones on *private* land, when it asserted the right to refuse a franchise on the basis of *any* factor which the City deemed to be in the public interest, and when it required a franchisee to waive the right to challenge the City's imposition of illegal conditions. *Id.* at 81-82. We therefore ruled that White Plains's regulatory scheme violated § 253.

That ruling is of no comfort to Global. As for the aspects of the ruling which depended on the conclusion that White Plains was undertaking to regulate telecommunications beyond the scope of its lawful authority to regulate the use of the public rights-of-way, those have no bearing on any ruling in this case. New York City's denial of Global's franchise application is based only on the City's right under § 253(c) to regulate public rights-of-way. And as for the finding that the imposition of a fee on TCG, but not on one of its competitors, failed the nondiscrimination requirement of the safe harbor, this also is of no help. As explained above, the City's reasons for rejecting Global's application while accepting others were reasonable and nondiscriminatory.

Finally, the district court correctly refused to adjudicate Global's claims that several provisions of the City's regulatory scheme, including advertising restrictions, violate the TCA. The provisions noted by Global affect only entities operating under a license,

and Global, which had no license to operate, was not affected by them. It therefore lacked standing to challenge them. *Cf. Schisler v. Sullivan*, 3 F.3d 563, 566 n.2 (2d Cir. 1993) (ruling that parties that have received full relief and will not be affected by the regulations lack standing). [562 F.3d at 153]

II. Preemption by Federal and State Law

Global argues that the City's regulatory scheme is preempted by both federal and state law. These arguments are without merit. The district court dismissed Global's state law preemption claim, holding that Global failed to make a showing that the New York State Public Service Law ("NYSPSL") limits the City's authority to require compensation for the use of the public rights-of-way. On appeal, Global argues that the district court erred by failing to consider its claim that the City's actions are preempted by Section 99(2) of the NYSPSL which limits the authority to require pre-approval of transfers and assignments affecting PPT franchises. We find no error in the district court's ruling. First, Section 99(2) addresses only pre-approval of transfers and assignments; the district court was correct in finding that Section 99(2) does not limit the City's authority to require compensation for the use of public rights-of-way. Second, Global's rights with respect to transfers and assignments are unaffected by the City's actions. Global has no franchise right to transfer or assign. As for its PPT equipment itself, the City has not interfered with Global's opportunity to sell

it.[1]

Global's claim of preemption by federal law is based on Section 276 of the TCA, which provides that regulations issued by the Federal Communications Commission (FCC) preempt any inconsistent state requirements. 47 U.S.C. § 276(c). Global argues that the City's regulatory scheme is inconsistent with an FCC regulation, 47 C.F.R. § 64.1330(a), which mandates the removal of any "regulations applicable to payphones and payphone service providers that impose market entry or exit requirements." The district court ruled that "[a]n isolated refusal to deal with an applicant known for payment defaults and the defrauding of payees is not a 'regulatory barrier to entry and exit'" of the type contemplated by the FCC regulation. *Global*, 507 F. Supp. 2d at 374. We agree.

III. Constitutional Claims

Finally, the district court correctly dismissed all of Global's federal constitutional claims. First, Global does not challenge on appeal the district court's ruling that the City's actions did not violate the Contracts Clause, U.S. Const. art. 1, § 10. *Id.* at 376. Second, the

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[4] Global's rights are only with respect to the PPT equipment itself. Because it lacks a franchise, Global has no rights with respect to specific locations on City property or on building lines affecting the public rights-of-way. Global is free to transfer or assign its equipment to any entity regardless of whether that entity has a franchise; however, if the transferee does not have a franchise, it, like Global, will be legally obligated to remove the PPT equipment from City property and building lines intruding upon the public rights-of-way.

district court correctly found no violation of Global's right to due process as Global was presented with numerous and adequate opportunities, of which it availed itself, to present its case before the DoITT. Third, the district court properly denied Global's First Amendment claim alleging violations of its right to provide truthful commercial speech and non-commercial speech on its PPT installations because (1) "Global is not entitled to have PPT installations on the City's public rights-of-way, so the question of what advertising it could place on such installations (if it had them) does not arise" and (2) Global fails to present any evidence to support its contention that in denying Global's franchise application, the [562 F.3d at 154] City acted with retaliatory intent. *Id.* at 375.

APPENDIX A

CONCLUSION

The district court's order granting summary judgment in favor of the defendants is affirmed.

APPENDIX B: DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 30, 2007

No. 03 Civ. 7934 (LLS)
Published at 507 F. Supp. 2d 365

GLOBAL NETWORK COMMUNICATIONS, INC.,

Plaintiff,

v.

CITY OF NEW YORK et al.,

Defendants.

Aug. 30, 2007

[507 F. Supp. 2d at 367] Opinion and Order

LOUIS L. STANTON, District Judge.

Defendants move for summary judgment dismissing the complaint.

Plaintiff Global Network Communications, Inc. ("Global") claims that the defendant City of New York's ("City") regulations governing public pay telephones ("PPTs"), its denial of Global's application for a fran-

chise to operate PPTs on City sidewalks and its removal of some of Global's PPTs violated federal law and Global's constitutional rights.

On June 9, 2005, this Court dismissed Global's claims, holding that when it denied Global's application, the City properly relied on the testimony of Global's sole owner and chief executive, Ronald Massie, an associate of the Bonanno organized crime family, who had a flagrant history of criminal activity, including defrauding the owners of business that let Global place its PPTs on their property. 373 F. Supp. 2d 378 (S.D.N.Y. 2005). The Court of Appeals vacated and remanded, holding that Massie's testimony and the City's final denial of Global's application were not properly considered on a motion to dismiss. 458 F.3d 150, 158 (2d Cir. 2006).

On remand, the City's motion was converted into one for summary judgment so that both parties could present all materials pertinent to such a motion under Fed. R. Civ. P. 56.

BACKGROUND

The PPT Regulations

Local Law 78, adopted by the City in 1959, made it illegal to operate PPTs on City streets without a license. Nevertheless, by the early 1990s several companies had installed PPTs on City streets without licenses. Local Law 68 of 1995 legalized previously installed, unlicensed PPTs on City streets, provided that their owner place such PPTs on an interim regi-

stry list, pay $75 per telephone per year in interim registry fees, and obtain a franchise from the City Department of Information Technology and Telecommunications ("DoITT") qualifying the company to obtain permits to operate PPTs on City streets in exchange for fees. Local Law 68, § 6.[1] A company whose franchise application is denied must either remove its PPTs from City streets or sell its PPTs to a company that has a franchise within a specified time. *Id.*

Rejection of Global's PPT Franchise Application

Global was one of the companies that operated unlicensed PPTs on City streets before the PPT Regulations were enacted. In 1996 Global submitted approximately [507 F. Supp. 2d at 368] 1,000 of its PPTs located on or near City sidewalks to the City's interim registry, and in June 1997 submitted its application for a franchise.

As part of DoITT's evaluation of Global's application, an August 21, 1998 internal DoITT memorandum reported that a criminal investigation into Global's operations was pending, and noted that Global had a history of complaints for vandalism, threats of physical violence and intimidation, and installation of unauthorized telephones. (Murray March 28, 2007 Aff. ("Murray Aff."), Ex. J.) On May 30, 2000, after further

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[1] Local Law 68, the City's authorizing resolutions, DoITT's Requests for Franchise Proposals, and the City's Model Franchise Agreement are referred to collectively as the "PPT Regulations."

investigation, the Commissioner of DoITT ("Commissioner") denied Global's franchise application, stating that Massie, along with Global's vice-president and bookkeeper, Alan Roth, had been arrested by the FBI on March 1, 2000. (Murray Aff., Ex. L at 2.) The Feb. 29, 2000 criminal Complaint and Affidavit in Support of Arrest Warrants identified Massie as an associate of the Bonanno organized crime family and detailed his illegal loan-sharking activities. (*United States v. Massie,* No. 00-0358M (E.D.N.Y.) (Murray Aff., Ex. K.)) The Commissioner also cited a search warrant affidavit which alleged that Massie had laundered money, including the proceeds of illegal loan-sharking, through Global to organized crime members, and that he had directed Roth to skim more than $4,000 per week in cash receipts from Global's PPTs for Massie's personal use by falsely reducing the receipts and altering computer records. (Murray Aff., Ex. L at 3-4.)

Global challenged DoITT's decision in a proceeding in the Supreme Court of the State of New York pursuant to N.Y. C.P.L.R. Art. 78. That Court remanded Global's application to DoITT, to give Global an opportunity to respond to the criminal allegations and to explain what relationship, if any, they had to Global's business operations. *Global Network Communications, Inc. v. Dorbin,* No. 120402/00, at 9 (LGG) (N.Y. Sup. Ct. July 1, 2002) (Murray Aff., Ex. M) (the "Article 78 Proceeding"). The Court stated that if Global separated itself from Massie and resubmitted its application, DoITT must reevaluate its decision in light of Global's new ownership and management. *Id.* at 11. The Court also stated that "The allegations of criminality and ties to organized crime are most

serious, and, if supported by proper proof, would establish a rational basis for finding lack of responsibility and denial of the franchise and permit." *Id.* at 9.

On November 7, 2001, while the Article 78 Proceeding was pending, Massie pled guilty to mail fraud, mortgage fraud and conspiracy to collect extortionate extensions of credit.[2] At his plea allocution, Massie admitted that he defrauded businesses who were entitled to commissions for allowing Global's PPTs to be placed on their property by paying them less than what they were owed under their agreements with Global. *United States v. Massie,* No. 00 Cr. 0440 (E.D.N.Y.) (Nov. 7, 2001 Tr. 24-25) (Murray Aff., Ex. O.)

On remand from the Article 78 proceeding, the Commissioner notified Global on February 28, 2003 that he was considering again denying its application, citing Massie's guilty plea, and gave Global ten days to submit any arguments or evidence challenging the proposed decision. (Murray [507 F. Supp. 2d at 369] Aff., Ex. Q.) Global responded by demanding a hearing and an opportunity to update its franchise application, and arguing that the City's franchise regulations were preempted by federal law. (March 28, 2003 letter to DoITT Commissioner, Murray Aff., Ex. R.) However,

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[2] The state court was apparently not provided in the Article 78 Proceeding with a copy of the indictment or criminal information to which Massie pled guilty, and therefore could not evaluate whether the conviction implicated Global's business. *Global Network Communications, Inc. v. Dorbin,* No. 120402/00, at 9 (LGG) (N.Y. Sup. Ct. July 1, 2002) (Murray Aff., Ex. M.)

Global did not challenge Massie's plea allocution, and acknowledged that a criminal charge to which Massie had pleaded guilty related to Global's financial operations (*id.* at 4).

DoITT discovered more evidence of Global's involvement with organized crime. On April 23, 2003, Massie testified as a cooperating government witness against an alleged organized crime member. He testified that approximately 20 to 30 percent of Global's business derived from PPT locations that were enlisted or identified by members of the Bonanno organized crime family, that Global paid those family members monthly commissions, and that Massie was allowed to use the name of Frank Lino, a "made" member of the Bonanno organization, to "intervene in any problems that we came across in the course of [Global's] business." (*United States v. George Lombardozzi,* Apr. 23, 2005 Trial Tr. 537-543) (Murray Aff., Ex. S.) Massie also admitted that over a period of three years the amount he skimmed from the PPT commissions totaled approximately $1,800,000:

> Q: Okay, Mr. Massie, you also told us that you pled guilty to mail fraud, correct?
>
> A: That's correct.
>
> Q: What did you do in connection with your plea of guilty to mail fraud?
>
> A: We mailed checks out to the people that receive commissions, based on the income of [Global].

Q: Okay. What was fraudulent about that?

A: Instead of reporting all of the income, I skimmed money off the top, so it's not reported, thus, when we sent the commissions out, it wasn't based on the full amount of money collected.

Q: Mr. Massie, approximately how much money did you skim when you were making these computations on the telephone commission?

A: About a $1,800,000.

Q: Over what period of time?

A: From May of '97 through March of 2000.

Q: Did you pay taxes on the money that you skimmed?

A: I did not.

Q: What did you do with some of the money that you skimmed?

A: I diverted some of it offshore. I made loans with some of it.[3]

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[3] The loans were presumably in connection with his loan-sharking business, in which he made loans at an interest rate of 2% per week (i.e., $700 per week on a $35,000 loan) and payment was enforced by threats (*id.* at 525).

(*Id.* at 526.) He also admitted other crimes, including running a multi-million dollar international cocaine smuggling ring:

> Q: How is it that you became involved in cocaine trafficking with people from Brazil?
>
> A: There is a national holiday in February called the Carnival. I went down there for a party. At the party I met some, some influential people who ended up being in that business and I was able to enter into agreements with them to supply merchandise to me.
>
> Q: When you say merchandise, you are referring to cocaine?
>
> A: I am.
>
> Q: What quantities of cocaine were you trafficking at this point?
>
> [507 F. Supp. 2d at 370] A: When I entered into the agreement with them, we were, we were-I, I, I was selling ounces and sometime a half a kilo or more. After the involvement with them it became kilos only.

(*Id.* at 550.)

DoITT's staff recommended that Global's PPT franchise application be denied. (Recommendation attached to October 28, 2004 letter from DoITT Commissioner to Massie, Murray Aff., Ex. T.) It relied on several grounds, including:

> 1) Global benefited from organized crime intimidation; 2) Global has defrauded property owners who authorized use of their property for Global PPTs; 3) Global has been repeatedly delinquent in payment of registry fees and thus cannot be reliably trusted to pay franchise compensation[.]

(*Id.* at 5.) It further stated:

> Global cannot be reasonably trusted to timely and fully pay the City the reasonable compensation to which it would be entitled under a franchise contract or to otherwise abide by the terms of a franchise contract with the City. Were the City to grant Global a franchise to use City street property for its PPTs, the City would be a location provider in the same position as location providers who Global intentionally defrauded according to Massie's own admissions under oath. It would not be appropriate for the City to put itself in this position.

(*Id.* at 9.)

Global was given another opportunity to submit any arguments or evidence refuting DoITT's findings or disputing its recommendation. (*Id.* at 12.) Global's January 12, 2005 response neither disputed Massie's testimony, nor challenged the City's claim that Global was delinquent in payment of interim registry fees. (Jan. 12, 2005 letter to DoITT Commissioner, Murray Aff., Ex. V.) It did state that Global and Massie had

"indicated a willingness to separate Massie from Global's day to day operations." (*Id.* at 3.)

DoITT nevertheless issued a final determination on March 11, 2005 ("Final Determination") denying Global's PPT franchise application, and stating:

> As set forth in detail below, there are multiple independent bases for not proposing the award of a franchise to Global to the Franchise and Concession Review Committee: (1) Global established a significant part of its business through its use of organized crime soldiers; (2) Global has defrauded property owners who authorized use of property for Global's PPTs; and (3) Global has been repeatedly delinquent in the payment of registry fees and thus cannot be reliably trusted to timely pay franchise compensation and also has significant unpaid fines related to its payphone operations that remain payable to the City.
>
> . . . .
>
> The City has legitimate right-of-way management concerns that include, for example, whether users of the right-of-way are able to complain about some aspect of a street PPT without fear of intercession by organized crime figures, whether City personnel whose task is to enforce management of rights of way requirements can perform their jobs without fear of organized crime action, and whether reasonable compensation for use of the rights-

of-way will be accurately paid to the City.

(Final Determination, Murray Aff., Ex. U at 1, 3.)

Prior Proceedings in this Court

Global filed its complaint in this lawsuit on October 7, 2003, and an amended complaint [507 F. Supp. 2d at 371] on July 1, 2004.[4] It alleged that the PPT Regulations and denial of its franchise application were preempted by section 253(a) of the federal Telecommunications Act of 1996, 47 U.S.C. § 253(a), which provides that: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Global also claimed that the City denied it due process under the Fourteenth Amendment, violated its First Amendment rights and unconstitutionally impaired its contractual obligations to a third party, and Global sought damages, attorney fees and injunctive relief under 42 U.S.C. §§ 1983, 1988.

The City moved to dismiss, arguing that even if TCA § 253(a) otherwise required it to grant Global a franchise to operate PPTs on City sidewalks, the rejection of Global's application was proper under section 253(c) of the TCA, which provides that:

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[4] The original and amended complaints are referred to as the complaint.

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. 253(c).

This Court agreed, stating:

> The City's action in denying Global's application for a franchise fits comfortably within this safe-harbor exception. Inherently, the City's right to require compensation from telecommunications providers includes the reasonable expectation that its compensation will be paid accurately in full, on time, and without criminal involvement or fraud.

373 F. Supp. 2d 378, 379 (S.D.N.Y. 2005) ("June 9, 2005 Opinion"). Since Global was validly denied a franchise, it had no standing to challenge the City's PPT Regulations. *Id.* at 382.

Global's constitutional claims were also dismissed, but without prejudice to Global reasserting its claim that the City's determination was arbitrary and capri-

cious in a New York state court.[5]

Court of Appeals' Decision

The Court of Appeals for the Second Circuit vacated, and remanded with instructions to convert the City's motion to dismiss into one for summary judgment which could properly consider matters outside the pleadings, such as Massie's trial testimony and DoITT's Final Determination. 458 F.3d at 152. The Court of Appeals expressed "no opinion regarding the correctness of the trial court's rulings on the merits, and it may well be that upon a motion for summary judgment the court will reach the same conclusions as it did initially." *Id.* at 158.

The City's motion to dismiss was converted into one for summary judgment under Fed. R. Civ. P. 56 on October 20, 2006, and both parties presented their materials [507 F. Supp. 2d at 372] supporting and opposing the motion, a process which was completed in early July 2007.

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[5] Global subsequently asserted those claims in a second Article 78 proceeding. The state court held that the Commissioner was entitled to rely on Massie's criminal history as demonstrating that he lacked the character required to obtain a franchise, and that the Commissioner's denial of Global's application was a lawful exercise of his discretion under state law. *Global Network Communications, Inc. v. Menchini,* No. 109531/05, at 4 (PGF) (N.Y. Sup. Ct. Nov. 28, 2005) (Murray Aff., Ex. X) ("2005 Article 78 Decision").

APPENDIX B

SUMMARY JUDGMENT

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). All reasonable inferences are to be made in favor of the nonmoving party. *See Tenenbaum v. Williams,* 193 F.3d 581, 593 (2d Cir. 1999). If the moving party meets its burden of showing that there is no genuine issue of material fact, then the nonmoving party "must come forward with evidence that would be sufficient to support a jury verdict in his favor." *Goenaga v. March of Dimes Birth Defects Found.,* 51 F.3d 14, 18 (2d Cir. 1995).

DISCUSSION

Section 253 of the Telecommunications Act

The federal Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 253(a) in sweeping terms forbids any state or local statute, regulation or legal requirement that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." However, a special provision preserves untouched the right of State and local governments to require fair compensation for use of local public streets. Section 253(c) expressly excludes, and provides a safe harbor for, "the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable

compensation from telecommunications providers . . . for use of public rights-of-way. . . ."[6]

The City's action in denying Global's application for a franchise fits comfortably within this safe-harbor exception. Inherently, the City's right to require compensation from telecommunications providers includes the reasonable expectation that its compensation will be paid accurately in full, on time, and without criminal involvement or fraud. No federal law or regulation should be construed to force the City to franchise Global to provide PPT services on New York City's public property and rights-of-way, when the record shows that Global cannot be expected to pay its obligations to the City in a timely or honest manner. The undisputed evidence supports the City's determination that it need not trust Global to pay the City's compensation in such a manner. Global does not challenge the evidence of its criminal history or non-payment of interim registry fees. Instead, it argues that the City's franchise denial was not a valid exercise of its authority to manage use of the rights-of-way and to require compensation for such use. But if Global were franchised to operate PPTs on City streets, the City's position would be similar to the property owners Massie admitted defrauding. The Second Circuit has recognized that under TCA § 253(c) a regulation "might permit rejection of a transferee on the basis of insufficient assurance of ability to pay reasonably imposed

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[6] The omitted portions of this quotation require that the compensation be competitively neutral and nondiscriminatory, and publicly disclosed.

fees for use of rights-of-way." *TCG New York, Inc. v. City of White Plains,* 305 F.3d 67, 82 (2d Cir. 2002) (dictum).

Nor does Global's speculation that it has overpaid the City (the subject of a current dispute) diminish the legitimacy of the [507 F. Supp. 2d at 373] City's concerns. Local governments as well as "Courts are free to assume that past misconduct is 'highly suggestive of the likelihood of future violations.'" *United States v. Carson,* 52 F.3d 1173, 1184 (2d Cir. 1995), quoting *SEC v. Management Dynamics, Inc.,* 515 F.2d 801, 807 (2d Cir. 1975).

Global argues that the City's denial of its application was discriminatory and therefore not protected by TCA § 253(c) because the City has granted telecommunication franchises to other companies that also have engaged in unscrupulous business practices. Global points to occasions on which Verizon, Qwest, MCI/Worldcom and Consolidated Edison have been fined for violations of consumer protection laws and environmental crimes, settled charges of securities fraud, and have been accused of defrauding other companies. It asserts that Verizon has installed PPTs without licenses and been involved in a dispute with the City about commissions properly owed to the City on its PPT revenues. Whatever the merits of those matters, none of them is claimed to involve obtaining 20-30% of the business through organized crime family members, using them to resolve disputes, paying them commissions, loan-sharking or cocaine smuggling. Nor is there a parallel in the employment of Alan Roth (a former Global employee who pled guilty to the same

indictment as Massie) in the daily operations of a telecommunications company that holds a PPT franchise and "is one of the five largest PPT operator[s] in the City." (Pl.'s May 25, 2007 Opp. Br., p. 17). Mr. Massie is the sole shareholder and chief executive of Global, whose very business is partly the product of organized crime members and whose customers were defrauded by Global of $1.8 million.

Finally, Global argues, as it did in opposition to the City's motion to dismiss, that numerous provisions of the City's PPT Regulations, on their face, are not limited to its management of public rights-of-way or requirement of compensation under TCA § 253(c). For example, Global complains that the City has assumed unfettered discretion to deny franchises, impermissibly regulate telecommunication services, rates and equipment, require approval of advertising vendors and demand a percentage of advertising commissions, and it asserts that many of the regulations are neither competitively neutral nor non-discriminatory, because they favor Verizon over other PPT operators. As stated in the June 9, 2005 Opinion, 373 F. Supp. 2d at 382, such provisions "might not survive examination under the case law" but those matters are immaterial here, for two reasons. *First,* the City's refusal of a franchise to Global rests solidly on its authority to obtain compensation for the use of its rights-of-way, without need for further support under the City's general right of administration or consideration of its scope. *Second,* since Global has no franchise it is unaffected by such provisions, and has no standing to complain of them.

In short, there is no factual issue presented altering

the conclusion that the City's rejection of Global's application lay within the "safe harbor" provision of § 253(c), and the claim of violation of TCA § 253 is dismissed.

Market Entry or Exit Regulation

Global argues that the City's actions were unauthorized because the Federal Communications Commission has passed a regulation providing that: "Each state must review and remove any of its regulations applicable to payphones and payphone service providers that impose market entry or exit requirements." 47 C.F.R. § 64.1330(a).

[507 F. Supp. 2d at 374] In its Report and Order, the FCC elaborated on the meaning of "market entry or exit requirements":

> The competition we observe today, however, has been significantly distorted by government regulation of prices, regulatory barriers to entry and exit, as well as by significant subsidies from other telecommunications services. Regulated prices prevent the market from operating efficiently to deploy payphone facilities. Moreover, some states currently prohibit the provision of payphone service by any entity other than the incumbent LEC. Removing these types of entry and exit restrictions is a necessary step toward allowing competitive forces to guide both the deployment of payphones and the setting of prices for payphone services.

APPENDIX B

Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 1996 WL 547458, 11 F.C.C.R. 20541, 20548 at ¶ 13 (1996).

The City's denial of a franchise to Global has nothing to do with "government regulation of prices." Nor does it reflect the type of "regulatory barriers to entry and exit" contemplated by the FCC regulation. An isolated refusal to deal with an applicant known for payment defaults and the defrauding of payees is not a "regulatory barrier to entry and exit." Nor did the City's denial of the individual franchise have anything to do with subsidies of other telecommunications services, or preference for an incumbent provider of PPT service.

Since the final determination to deny Global the franchise rested on Global's defaults on its obligations to the City and its untrustworthiness to pay compensation honestly, it is unaffected by the FCC regulation.

Due Process

In 2005 this Court dismissed, for failure to exhaust state law remedies, Global's claim that the City acted arbitrarily and capriciously in denying the franchise and removing the PPTs. June 9, 2005 Opinion, 373 F. Supp. 2d at 381. Global thereafter pursued its state remedies, bringing the 2005 Article 78 proceeding in New York Supreme Court. That Court held:

> Commissioner Menchini lawfully exercised his discretion in denying Global's application

> for an award of a public pay telephone franchise on the ground that Global's principal, Massie, lacked the requisite good character, honesty and integrity. In reaching his determination, Commissioner Menchini was entitled to rely on Massie's past criminal history as demonstrating a lack of the character required for [*sic*] franchisee. . . . Accordingly, Commissioner Menchini's determination was rational, and not arbitrary and capricious within the meaning of the law.

(2005 Article 78 Decision, Murray Aff., Ex. X at 4.) The N.Y. Supreme Court also rejected Global's claim that the City was required to entertain its proposal to separate Massie from Global's day to day operations. (*Id.* at 5) ("the respondents are not required to accept Massie's offer to divest himself of any interest in Global except a passive economic interest."). Because the Article 78 proceeding provides an adequate remedy for an arbitrary or capricious deprivation of property, *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 881-82 (2d Cir. 1996), Global's substantive due process claim is dismissed.

Global's claim that it was denied sufficient notice and opportunity to object to the City's franchise denial is dismissed because Global has had, and used, ample [507 F. Supp. 2d at 375] opportunities to present its case to DoITT. On February 28, 2003, the City issued a formal "Notice of Opportunity to Oppose Commissioner's Proposed Decision Not to Propose Award of a Public Pay Telephone Franchise to Global Network Communications, Inc." It set out the City's reasons for

its proposed franchise denial, and invited Global to submit its arguments and evidence why the decision should not be rendered. Global replied at length in a letter dated March 28, 2003. On October 28, 2004, DoITT staff recommended that the Commissioner not propose Global for a PPT franchise. Again, it addressed the merits of the determination, and invited a response from Global. Global again responded, by letter dated January 12, 2005. At the end of this process, and fully aware of Global's views, DoITT issued its Final Determination on March 11, 2005. The Final Determination explicitly addressed each of Global's objections, and DoITT's reasons for rejecting them.

The facts on which the City relied in reaching its decision are primarily contained in Mr. Massie's own testimony in *United States v. Lombardozzi,* and do not require an evidentiary hearing. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge,* 424 U.S. 319, 333-35, 96 S. Ct. 893, 902-03, 47 L. Ed. 2d 18 (1976); *see also John Gil Constr., Inc. v. Riverso,* 72 F. Supp. 2d 242, 254-55 (S.D.N.Y. 1999) ("The Due Process Clause does not demand that the government provide a full evidentiary hearing each time it infringes upon a party's property or liberty interest"), citing *Tully Const. Co., Inc. v. Hevesi,* 214 A.D.2d 465, 466, 625 N.Y.S.2d 531, 532 (N.Y. App. Div. 1st Dept. 1995) ("in reaching a determination of nonresponsibility," of an applicant for a City contract, "written submissions, rather than an evidentiary hearing, are sufficient to satisfy the necessary requirements of due process" where the evidence included an FBI agent's sworn declaration of peti-

tioner's connection to organized crime). Thus, Global's procedural due process claim is dismissed.

First Amendment

Global claims that the City's actions:

> . . . violate Global's rights to provide truthful commercial speech and non-commercial speech on its PPT installations, because Defendants refuse to allow Global to place advertising on its Curb-Line PPTs in the manner that the Defendants allow advertising on Curb-Line PPTs owned by those entities to which the Defendants have awarded PPT franchises . . .

(Am. Compl. ¶ 254.)

Since Global has not been awarded a PPT franchise, comparisons with those who have been awarded such franchises are meaningless. Global is not entitled to have PPT installations on the City's public rights-of-way, so the question of what advertising it could place on such installations (if it had them) does not arise.

Global claims that the rejection of its franchise application by the City was retaliation against it for bringing the 2002 Article 78 Proceeding and this action. Global has made no showing that the City's denial of its application was in response to the filing of the 2002 Article 78 Proceeding or this action. DoITT first recommended that Global's PPT franchise application be denied in its August 21, 1998 internal memorandum, and again in its May 30, 2000 decision;

both occurred before Global commenced either the 2002 Article 78 Proceeding or this 2003 action. Thus, the City's post-lawsuit actions are entirely consistent with the City's earlier franchise denial. There is no basis for speculation that the City acted with retaliatory intent. [507 F. Supp. 2d at 376.] *See Friedl v. City of New York*, 210 F.3d 79, 85-86 (2d Cir. 2000) ("To survive a motion to dismiss, such claims must be 'supported by specific and detailed factual allegations,' not state 'in wholly conclusory terms.'").

Nor can the City's refusal to reconsider its decision in light of Global's offer to separate itself from Massie be viewed as a form of retaliation. Global did not offer to sever its economic connection from Massie completely (but only from its operations) and the City was entitled to consider his total ownership, as well as Global's other connections to organized crime and the fact that it had defaulted on its payment obligations. *Cf.* (2005 Article 78 Decision, Murray Aff., Ex. X at 4) ("the respondents are not required to accept Massie's offer to divest himself of any interest in Global except a passive economic interest.").

Accordingly, Global's claims of violation of its right to free speech, and of retaliation for its litigation, are both dismissed.

Contract Clause

Global claims that, by denying it a franchise to install and maintain PPTs on public rights-of-way, the City has "substantially impaired Plaintiffs rights under its contracts with third parties" in violation of

the Contracts Clause, U.S. Const. Art. 1, § 10. (Am. Compl. ¶ 237.) Global had entered into a contract to provide PPT services for Kinney System, Inc., a public parking garage operator, and "installed numerous pay telephones pursuant to the Kinney Contract on City sidewalks adjacent to parking garages operated by Kinney System, Inc." *Id.* at ¶ 242.

The City's franchise denial does not discharge Global's obligations under its contract with Kinney, nor Kinney's obligations to Global. If Global is unable to perform, Kinney's remedies for breach are unimpaired. It was Global's duty to be able to perform its obligations, and it took the risk that it might fail to obtain the franchise (or license) that it needed in order to perform its obligations.[7] Nothing in the contract between Global and Kinney, or any other private party, could impose any duty upon the City to grant Global's franchise application. As stated by Mr. Justice Holmes, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them." *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 357, 28 S. Ct. 529, 531, 52 L. Ed. 828 (1908); *see also Manigault v. Springs,* 199 U.S. 473, 480, 26 S. Ct. 127, 130, 50 L. Ed. 274 (1905) (". . . parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."); *Knoxville Water Co. v.*

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[7] In this case, it makes no difference that the law requiring a franchise came into effect after the Kinney contract. When the Kinney contract was made, Local Law 78 of 1959 required a license for the installation of PPTs, and Global did not have one.

City of Knoxville, 189 U.S. 434, 438, 23 S. Ct. 531, 532, 47 L. Ed. 887 (1903) ("Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts.")

Global proceeded at its own peril in light of the risk that it might not obtain a franchise. Global's claim that its contract was unconstitutionally impaired is dismissed.

New York Public Service Law

Since Global makes no claim that the New York Public Service Law limits the City's authority to require compensation [507 F. Supp. 2d at 377] for the use of its public rights-of-way, its claims under that law are dismissed.

42 U.S.C. §§ 1983 and 1988

Global's claims under 42 U.S.C. § 1983 and 1988 are dismissed because all the underlying claims have been dismissed.

CONCLUSION

For the above reasons, the City's motion for summary judgment is granted. The Clerk will enter judgment dismissing the complaint and amended complaint, with costs and disbursements to the defendant according to law.

So ordered.

Dated: New York, NY
August 30, 2007

/s/
Louis L. Stanton
U.S.D.J.

APPENDIX C

APPENDIX C: ORDER DENYING MOTION FOR RECONSIDERATION OR EN BANC CONSIDERATION DATED JULY 10, 2009

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of July, two thousand and nine,

---

Global Network Communications, Inc.,

Plaintiff-Appellant,

v.

City of New York and City of New York Department of Information Technology and Telecommunications,

Defendants-Appellees.

ORDER

Docket Number: 07-5184-cv
[FILED JULY 10, 2009]

APPENDIX C

Appellant Global Network Communications, Inc. having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk

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Supreme Court, U.S.
FILED
NOV 10 2009
OFFICE OF THE CLERK

No. 09-432

IN THE
SUPREME COURT OF THE UNITED STATES

GLOBAL NETWORK COMMUNICATIONS, INC.,

Petitioner,

-v.-

CITY OF NEW YORK and CITY OF NEW YORK DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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November 9, 2009

QUESTION PRESENTED

Did the Court of Appeals correctly affirm the District Court's grant of summary judgment to respondents City of New York and its Department of Information Technology and Telecommunications because the City's actions fall squarely within the safe harbor provisions of section 253(c) of the Telecommunications Act of 1996, 47 U.S.C. § 253?

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No. 09-432

IN THE SUPREME COURT OF THE UNITED STATES

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-v.-

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

REASON FOR DENYING THE PETITION

THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT. THAT COURT'S ORDER DOES NOT CONFLICT WITH PRECEDENTS OF THIS COURT OR THE OTHER COURTS OF APPEALS.

Petitioner has not demonstrated that the case at bar is appropriate for review by this Court. The City wishes to emphasize two points. First, the Court of Appeals correctly affirmed the grant of summary judgment to the City. Second, contrary to petitioner's argument, there is no conflict between the case at bar and prior precedents of the Court of Appeals for the Ninth Circuit.

(I) In the case at bar, the Court of Appeals decided a narrow issue: whether under section 253 of the Telecommunications Act of 1996, a municipality can deny a franchise to a telecommunications provider on the basis of its ties to organized crime, its past history of fraud, and its debts and arrears. The Court of Appeals concluded that the City had acted within its authority under the safe harbor provisions of section 253(c) of the TCA. That statute protects the authority of local governments to manage public rights-of-way and to require fair and reasonable compensation from telecommunications providers.

Section 253(c) states that:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

This safe harbor provision preserves from preemption the power of municipalities to manage the use of their sidewalks and roads and to mandate reasonable compensation for private occupancy of such sidewalks and roads. Both the District Court and the Court of Appeals correctly held that, as a matter of law, the City's refusal to grant a franchise to petitioner came within this statutory safe harbor.

The Court of Appeals recognized the City's proper exercise of its management powers to avoid dealing with a convicted criminal, an organized-crime figure, and an untrustworthy business entity:

> On May 30, 2000, the DoITT rejected Petitioner's initial request for a franchise on the grounds that its CEO and sole shareholder, Ronald Massie, is an associate of the Bonnano organized crime family accused of loan sharking and money laundering through the company. Massie subsequently pleaded guilty to a

> federal indictment charging him with loan sharking, mail fraud, and bank fraud. ...
>
> The City's actions in this case fall within this "safe harbor" exception. The statutory grant of authority to "manage the public rights-of-way" encompasses the right to reject an applicant on the basis of its affiliation with organized crime, especially upon a demonstrated record of operating the facilities fraudulently, or otherwise in violation of law, with reliance on organized crime to further its business interests. We conclude that the City's refusal to grant Global a franchise to operate on the public rights-of-way on the basis of this past history is fully within the scope of the authority provided by Section 253(c).

Petition at 4a, 10a.

If petitioner's argument is correct, the City would be required to contract, despite the obvious risks, for use of public property with a franchisee with a substantial history of involvement in criminal activities and with a record of fraud on business associates and government and failure to meet its financial obligations. Petitioner's interpretation of the statute is plainly unreasonable.

Petitioner advances the related but distinct argument that the City could have issued a franchise to it and protected its ability to collect compensation by requiring a security bond.

Petition at 16-18. Such a bond, however, would not protect the City from petitioner's fraudulent reporting of its activities on which its obligations are based, a form of misbehavior in which it has engaged in the past. A bond may protect against a contracting party's inability to pay or perform, but it would not protect the City from petitioner's dishonest concealment of its franchise obligations, which is the risk at stake here.

The District Count found that, on the record before it, the City could not trust petitioner to satisfy honestly its business obligations should it receive a franchise:

> No federal law or regulation should be construed to force the City to franchise Global to provide PPT services on New York City's public rights-of-way, when the record shows that Global cannot be expected to pay its obligations to the City in a timely or honest manner. The undisputed evidence supports the City's determination that it need not trust Global to pay the City's compensation in such a manner. Global does not challenge the evidence of its criminal history or nonpayment of interim registry fees. Instead, it argues that the City's franchise denial was not a valid exercise of its authority to manage use of the rights-of-way and to require compensation for such use. But if Global were franchised to operate PPTs on City streets, the City's position would be

> similar to the property owners Massie admitted defrauding

Petition at 32a. Petitioner's argument in this vein lacks merit.

Petitioner argues incorrectly that the administrative precedent of In re New England Public Communications Council, 11 FCC Rcd 19713, 1996 FCC LEXIS 6842 (1996) supports its case. In NE Public, the FCC found that the 253(b) safe harbor from preemption did not apply where the state required a licensing process that barred an entire, broad class of potential entrants. The case at bar is wholly distinguishable, as a case involving the section 253(c) safe harbor, not 253(b), and relating to a single company's publicly documented history of criminal involvement and fraud.

(II) Petitioner argues for a grant of certiorari claiming that the decision at bar is in conflict with three precedents of the Court of Appeals for the Ninth Circuit. Petition at 9-14. There is no such conflict.

There is no conflict between the Courts of Appeals as to basic principles of the TCA. Both Courts of Appeals agree that Section 253(c) provides a "safe harbor" for actions involving management of the rights-of-way. Section 253(c) also provides for the right to fair and reasonable compensation.

The three decisions petitioner cites as "conflicting" with the instant case are City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002), overruled in part by Sprint

Telephony PCS v. County of San Diego, 543 F.3d 571 (9th Cir. 2008)(en banc); and Qwest Communications v. City of Berkeley, 433 F.3d 1253 (9th Cir. 2006). Auburn and Berkeley examine the safe harbor provided by section 253(c). Petitioner points to the findings in those cases that regulations requiring an applicant to submit proof of its legal qualifications to offer telecommunications service do not fall within the "safe harbor" of section 253(c). Petition at 9-13. Petitioner further states that under section 253(c) as interpreted in those cases, a municipality cannot consider an applicant's legal qualifications to offer telecommunications service. Id. Petitioner states that Sprint Telephony PCS v. County of San Diego left the Auburn analysis of the scope of 253(c) undisturbed. Petition at 13.

In the instant case, however, the administrative decision of the City was not based on a public record demonstrating lack of qualification to offer telecommunications service. Rather, the City decision was based upon lack of trustworthiness to abide by basic obligations related to management of rights of way and reasonable compensation. The District Court and the Court of Appeals upheld the City's decision. None of the cases cited by petitioner as conflicting with the decision at bar involved facts indicating a demonstrable lack of trustworthiness of the entity seeking to contract for use of the public rights of way. The Ninth Circuit cases analyze the substantive scope of what constitutes "management of rights of way" activity covered by the safe harbor from preemption of section 253(c).

In light of different facts, the decision at bar dealt with a more fundamental issue. The Court of Appeals recognized that no matter how narrowly defined the substantive management of rights of way authority protected by section 253(c) may be, without a base level of trustworthiness on the part of a potential occupant of the right-of-way, there is no way for a local government to reliably contract with such an entity regarding any such management of rights of way related obligations. Thus, the decision is entirely consistent with the Ninth Circuit cases on the scope of section 253(c); it simply dealt with a precondition of contractual trustworthiness that was not presented in the Ninth Circuit cases.

In the case at bar, the Court of Appeals affirmed the District Court's finding that "[a]n isolated refusal to deal with an applicant known for payment defaults and the defrauding of payees is not a 'regulatory barrier to entry or exit.'" Petition at 36a. Unlike in Auburn and Berkeley, the Court in the case at bar never discussed the application process. The Global Court found that under section 253(c), a municipality can consider the public record when denying a franchise to a telecommunications provider on the basis of its ties to organized crime, its past history of fraud, and its debts and arrears. Petition at 36a. The Court found that the City's determination to deny petitioner a franchise falls within the "safe harbor" provision of section 253(c) after considering the evidence of the decision's practical effect. To decide that a municipality cannot consider the legal qualifications of petitioner would require the City of New York to knowingly ignore the guilty plea and admitted ties to organized crime of its

president and sole shareholder as well as the company's history of fraud and its debts and arrears.

(III) Even if, *arguendo*, the Court of Appeals for the Second Circuit were incorrect in its view of the scope of municipal authority under section 253 generally, facts in this case would lead to the same result anyway. Let us assume (contrary to what actually happened) that the Court of Appeals had concluded that petitioner's record of criminal activity would have been beyond the scope of the City's authority to consider in the case of a phone company seeking to install, for example, underground phone lines passively transiting the public rights of way to serve private homes and businesses throughout the community. Petitioner's record of criminal activity would in any event have been within the scope of permitted municipal consideration in this particular case. Petitioner sought not to install phone lines merely transiting through the right-of-way. It sought to install payphones the sole purpose of which is to serve as an amenity to pedestrians on the public right-of-way. The scope of a municipality's "management of rights-of-way" authority is necessarily broader when the intended service itself is to be an amenity serving users of the right of way rather than merely a set of wires that pass through the right of way. Part of a municipality's management of right of way responsibility includes seeking reliable and efficient services to pedestrians and vehicles using such right-of-way. As such, even if petitioner's background and history of fraud and criminal activity were found beyond the scope of municipal "right-of-way management" consideration in cases involving wires passing through the right-of-way,

such matters would be self-evidently with the scope of such right-of-way management consideration in the context of a proposed sidewalk payphone provider.

(IV) In conclusion, the Court of Appeals for the Second Circuit correctly resolved this case. There is no conflict between the decision at bar and the precedents of this Court and the Courts of Appeals. In any event, the decision of the Court of Appeals for the Second Circuit would have been proper on other grounds, regardless of the merits of the actual grounds of the decision.

CONCLUSION

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI.

Dated: New York, New York
November 9, 2009

Respectfully submitted,

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